IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30-06-2006

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE R. SUDHAKAR

O.S.A.NO.358 OF 2000

Anand Properties,
rep. by its Partners,
L. Dharmichand &
P. Vinod .. Appellant/Plaintiff

Vs.

1. Midde Rama Rao
2. M. Santhakumari
3. Park Town Benefit Fund Ltd... Respondents/Defendants

Appeal filed under Order XXXVI Rule 11 of the High Court O.S. Rules read with Clause 125 of the Letters Patent Act against the order dated 11.9.2000 in Appln.No.262 of 2000 in C.S.No.830 of 1996.

For Appellant : Mr.T.V. Ramanujam
Senior Advocate for
Mr.P.J. George

For Respondents 1& 2: No Appearance

Respondent-3 : Mr.P.N. Swaminathan

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J U D G M E N T

P.K. MISRA, J

The present appeal is directed against the order dated 11.9.2000 rejecting the application filed by the present appellant, namely, Appln.No.262 of 2000 arising out of C.S.No.830 of 1996.

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2. The said suit has been filed by the present appellant claiming the following reliefs :-

" (a) directing the first and second defendants jointly and severally to perform their obligations under the agreement dated 31.10.1996 by executing and registering a Deed of Sale in respect of the property being buildings and structures and all that piece and parcel of land of an extent of 1 Ground and 2103 Sq.ft. comprised in R.S.No.622/3 Block No.36, Nungambakkam Village bearing Corporation Door No.10, Scheme Road, Mahalingapuram, Madras 34 more particularly described in the Schedule and handing over vacant possession of the same to the plaintiff.

(b). restraining the First and Second Defendants by an order of permanent injunction from dealing with the property described in the Schedule in any manner contrary to the terms and conditions of the agreements dated 31.10.1996.

(c). restraining the Third Defendant by an order of permanent injunction from foreclosing the mortgage and bringing the property described in the Schedule to sale.

(d). directing the Third Defendant by an order of mandatory injunction to accept the balance of mortgage dues from the Plaintiff when ascertained and tendered by the Plaintiff and to handover the original documents and records of title of the property described in the Schedule to the Plaintiff after discharging the mortgage."

3. According to the appellant/plaintiff, the property belonging to the respondents 1 and 2 was to be sold to the appellant for Rs.48 lakhs. Out of the consideration amount of Rs.48 lakhs, a sum of Rs.15 lakhs had been paid to the respondents 1 and 2 and Respondent No.3, who was mortgagee of the property, before filing of the suit. The appellant deposited a further sum of Rs.30 lakhs in the Court and the trial court by common order dated 5.3.1997 in O.A.Nos.683 and 684 of 1996, directed the respondent in O.A.No.683 of 1996 to withdraw such amount and not to put such property to auction in purported exercise of power under Section 69 of the Transfer of Property Act and to keep the original title deeds till disposal of the suit or till the parties arrive at some settlement. Accordingly the aforesaid sum of Rs.30 lakhs had been withdrawn by the present Respondent No.3 and to that extent the amount due to respondent No.3 from Respondents 1 and 2 had been adjusted. Thereafter, the appellant came to know that the respondents 1 and 2 had raised loan from Canara Bank by mortgaging the title deeds and a decree against Respondents 1

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and 2 had been passed by the Debt Recovery Tribunal and steps were being taken to realise the amount due under the decree by auctioning the property in question. At that stage, the appellant filed applications before the Debt Recovery Tribunal for being impleaded and for setting aside such decree. The present Respondent No.3, which was also a defendant before the Debt Recovery Tribunal, had been asked to produce the title deeds, which were said to be deposited with it and ultimately the Debt Recovery Tribunal found that the title deeds deposited with Canara Bank were original title deeds and the title deeds produced by Respondent No.3 were fake documents. Respondent No.3 had been served with notice in the proceedings before the Debt Recovery Tribunal and it was thus aware that there was a prior mortgage with Canara Bank in respect of the very same property and yet Respondent No.3 had not disclosed this aspect and if such aspect would have been made known to the present appellant, they would not have entered into any agreement with Respondents 1 and 2. On the basis of such averments, the appellant prayed that since Respondents 1 to 3 had committed fraud, Respondent No.3 should be directed to refund the amount of Rs.35,00,000/- with interest to the appellant. It was further prayed that if it is ultimately found that original title deeds dated 25.6.1983 deposited with Canara Bank are not genuine, appellant would refund the very same amount to Respondent No.3.

Respondents 1 and 2 in the suit did not appear to contest such application. However, Respondent No.3 filed counter affidavit wherein it was indicated that money had been advanced to Respondents 1 and 2 by Respondent No.3 on the basis of the documents produced by the Respondents 1 and 2 as per mortgage deed dated 3.8.1994. Since Respondents 1 and 2 were not repaying the amount, Respondent No.3 had issued notice for auction of the property in exercise of jurisdiction under Section 69 of the Transfer of Property Act. At that stage, the present appellant entered into a transaction with Respondents 1 and 2 to purchase property from them with the understanding that a sum of Rs.35 lakhs would be paid to the present Respondent No.3. Accordingly, Respondent No.3 tied his hands and did not proceed with auction as notified. A sum of Rs.5 lakhs had been paid earlier and subsequently the appellant had deposited a sum of Rs.30 lakhs in court, which was permitted to be withdrawn by the present Respondent No.3 as per order of this Court in O.A.No.683 of 1996. Such amount had been paid towards the consideration money and, the amount after being withdrawn, had been adjusted towards the loan account of Respondents 1 and 2 by Respondent No.3. Respondent No.3 had also claimed that he did not have knowledge about the proceedings initiated by the Canara Bank. It was further

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stated that Respondents 1 and 2 produced original title deeds along with clear no encumbrance certificate and there was no collusion between Respondent No.3 and Respondents 1 and 2. The appellant had filed application in Court numbered as O.A.No.683 of 1996 and on the basis of such application filed by the appellant, amount has been paid and such amount has been given credit to the amount due from Respondents 1 and 2 and there is no obligation on the part of Respondent No.3 to refund the money at the interim stage. It was further indicated that Respondent No.3 was willing to offer security by way of immovable property in the event of holding that Respondent No.3 is liable to pay the said amount.

4. Learned single Judge came to the conclusion that the third respondent was not aware of the proceedings initiated by the Canara Bank as it had been served with notice only in November 1995, whereas the loan had been sanctioned by the third respondent in 1994. Learned single Judge also came to the conclusion that it only transpired subsequently that the title deed produced before Respondent No.3 was not the original document and Respondent No.3 had been duped by Respondents 1 and 2. Learned single Judge came to the further conclusion that the suit was filed for specific performance of the contract and the relief claimed in the Interlocutory Application regarding refund of Rs.35 lakhs is different from the relief claimed in the suit, more particularly when there is no alternative prayer for refund of consideration. It has been further concluded by him that Respondent No.3 after withdrawing the amount as per the order of the Court had given credit to the loan account of Respondents 1 and 2 and, therefore, it cannot be said that the amount deposited by the appellant is still available. It has been further observed :

> "13. ... When once the Applicant has given consent to enable the 3rd Respondent Benefit Fund Company to withdraw the same, it is final, conclusive and binding on the parties. Even assuming that the mortgage in favour of the 3rd Respondent by the Respondents 1 and 2 is not valid under law, it is a matter that can be decided only during the course of trial of the suit."

It has been further observed :-

> " ... Presently, the amount deposited by the Applicant has been given credit to the loan account of Respondents 1 and 2 and after giving security only, amount has been withdrawn by the 3rd Respondent and if ultimately the Applicant succeeds in the suit, there will not be any difficulty for the Applicant to get back the amount from the 3rd Respondent."

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5. Learned counsel appearing for the appellant has contended that since the appellant had been duped to enter into transaction and since Respondent No.3 had suppressed the fact that property was subject to a prior mortgage and proceedings were pending before the Debt Recovery Tribunal to which Respondent No.3 was a party, it must be taken that Respondent No.3 has committed fraud and such Respondent No.3 should not be allowed to take advantage of his own fraud and, therefore, a direction should be issued regarding refund of the money. Learned counsel has further submitted that direction regarding refund of such amount, which had been paid pursuant to the order of the Court, can be given in exercise of power under Section 144 CPC. or under Section 151 of CPC. if it is found that Section 144 is not strictly applicable.

6. There cannot be any doubt that when any order of the Court is reversed or modified subsequently, a person who receives any advantage by virtue of the earlier order of the court is required to return such advantage as envisaged Section 144 CPC and even where Section 144 is not applicable, similar power can be exercised under Section 151 CPC. Such position being well settled, it is not necessary to refer to several decisions cited by the learned counsel for the appellant including the decision of the Supreme Court reported in (1994) 1 SCC 1 (S.P. CHENGALVARAYA NAIDU (Dead) by LRs v. JAGANNATH (Dead) by LRs AND OTHERS).

7. The question is whether a direction for refund of the money should be given at this stage. As rightly observed by the learned single Judge, the appellant has volunteered to deposit the sum of Rs.30 lakhs to be paid to Respondent No.3. Such an offer had been made by the appellant obviously with a view to avoid the property being put to auction by Respondent No.3 in purported exercise of power under Section 69 of the Transfer of Property Act. It is no doubt true that in the proceedings before the Debt Recovery Tribunal, an observation has been made (much after the order regarding deposit and withdrawal had been made) that the documents deposited with Canara Bank were genuine documents, whereas the documents deposited with the present Respondent No.3 were not genuine. It is not necessary for us to consider the question as to whether such order of the Debt Recovery Tribunal is final or whether such question can be raised in the pending suit or not.

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8. Even assuming that the deeds of title deposited with Respondent No.3 were not genuine, there is no dispute regarding the fact that Respondent No.3 had advanced a sum of Rs.24 lakhs which Respondent No.3 had right to recover from Respondents 1 and 2. The present appellant obtained an order of injunction against Respondent No.3 not to put such property to auction in purported exercise of power under section 69 of the Transfer of Property Act and had offered to deposit a sum of Rs.30 lakhs to be paid to Respondent No.3. Even though it is quite obvious that Respondents 1 and 2 have tried to over-reach either Canara Bank or Respondent No.3 or may be both, the question is as to whether there was any collusion between Respondents 1 and 2 on the one hand and Respondent No.3 on the other hand to defraud the present appellant. As rightly observed by the learned single Judge, such a matter could not be decided at the interlocutory stage. Moreover, as observed by the learned single Judge, the suit is one for specific performance of contract. It may be that if the present appellant does not want to go through with the prayer of specific performance of contract, it can seek for refund of the consideration amount.

9. The money deposited by the appellant has already been withdrawn by Respondent No.3 and credited to the loan account of Respondents 1 and 2. If it is ultimately found that there was no collusion between Respondents 1 and 2 on the one hand and Respondent No.3 on the other hand, it may be taken that such amount has been paid to Respondents 1 and 2, in which event the appellant would get recovery of such amount from Respondents 1 and 2. On the other hand, if it is ultimately found that Respondents 1 and 2 as well as Respondent No.3 had defrauded the present appellant, since no person has a right to take advantage of his own fraud, a direction regarding refund of money can be given so far as Respondent No.3 is concerned. The tenor of the order passed by the learned single Judge can be only construed accordingly.

10. From the materials on record it appears that when the application for refund was filed, present Respondent No.3 had offered to furnish property security. However, it now transpires that instead of giving any property as security, Respondent No.3 has merely filed an affidavit regarding certain property. Since Respondent No.3 had offered to furnish property security, Respondent No.3 should make good such assurance.

11. In view of the above discussion, the appeal is disposed of in the following terms :-

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(1) The order passed by the learned single Judge should be construed only as an interlocutory order and not deciding the question finally.

(2) It would be open to the present appellant to seek for appropriate amendment of the plaint, seeking refund of the consideration amount from Respondents 1 and 2 as well as Respondent No.3. In case the appellant seeks for amendment of the plaint to include a prayer of refund from Respondent No.3, obviously, Respondent No.3 would be given further opportunity to contest the suit by filing written statement.
It is made clear that we have not expressed any opinion on such aspect and the matter relating to liability of Defendant No.3 to refund the amount has to be decided on its own merit and in accordance with law.

(3) Respondent No.3 shall furnish property security within six weeks to the tune of Rs.30 lakhs so that in case there is any direction in the suit regarding refund of consideration by Respondent No.3, such obligation can be met out of the property to be furnished as security.

(4) The appeal is accordingly disposed of. No costs.

dpk

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Deputy Registrar, Original Side,
High Court, Madras.

2. The Sub Asst Registrar,
Original Side,
High Court, Madras.

HPR(CO)
SR/10.7.2006

JUDGMENT IN OSA.NO.358/2000

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